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DISSERTATION

**“THE RELATION OF THE STRONG AND THE WEAK
PARTY IN MEDIATION”**

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TABLE OF CONTENTS

ABBREVIATIONS	p. 4
ABSTRACT	p. 5
I.- INTRODUCTION	p. 6
II.- EQUALITY BEFORE LAW	p. 7
III.- JUSTICE	p. 7
IV.- PROCEDURAL PRINCIPLES	p. 8
V.- ARBITRATION	p. 9
VI.- MEDIATION	p. 11
VII.- APPLICATION OF THE ADVERSARIAL SYSTEM'S PROCEDURAL PRINCIPLES IN MEDIATION	p. 13
VIII.- APPLICATION OF ARBITRATION'S PRINCIPLES IN MEDIATION	P. 14
IX.- ETHICAL DILEMMAS	p. 15
IX.- CODES OF CONDUCT	p. 19
X.- THE ROLE OF THE MEDIATOR	p. 24
XI.- THE VALUES OF MEDIATION	p. 25
A) SELF – DETERMINATION	p. 26
B) NEUTRALITY	p. 26
C) IMPARTIALITY	p. 28
D) CONFIDENTIALITY	p. 29
E) THE NON-BINDING CHARACTER	p. 30
XII.- POWER	p. 31
A) VARIOUS TYPES OF POWER IMBALANCE IN MEDIATION	p. 33
B) THE ISSUE OF FAMILY ABUSE	p. 34
XIII.- CONCLUSION	p. 37
BIBLIOGRAPHY	p. 39

ABBREVIATIONS

ADR	Alternative Dispute Resolution
ABA	American Bar Association
AAA	American Arbitration Association
ACR	Association for Conflict Resolution
BATNA	Best Alternative To a Negotiated Agreement
ΑΠ	Greek Supreme Court of Justice
ΕφΑθ	Appellate Court of Athens
ΕφΘεσ	Appellate Court of Thessaloniki
ΕφΘρ	Appellate Court of Thrace
ΠΠρΑθ	Multiparty First Instance Court of Athens
ΠΠρΛαρ	Multiparty First Instance Court of Larissa
ΜΠρΑθ	First Instance Court of Athens
Αρμ	Armenopoulos Legal Review of the Bar Association of Thessaloniki
p.	page

ABSTRACT

The examination of power equilibrium of two parties that bring their dispute before a mediator reveals the complex issues that may arise during mediation which can jeopardize fundamental rights of the weak party and end up in the failure of the process. In this regard it is worth studying whether principles of law established to serve the adversary system explicitly or implicitly apply in mediation, in order to provide the mediator with the legal grounds for the protection of the weak party and the exercise of his/her civil rights. On the same reasoning, the impact of arbitration principles as the primary alternative dispute resolution method and the degree of their influence in mediation is also worth studying. Power imbalances produce numerous ethical dilemmas for a mediator and challenge the core values that govern his role. Therefore, the investigation of available remedies or more preferably the strategy a mediator may follow is of extreme importance. At this paper we will specifically focus on power imbalance issues that derive from private relations, namely civil, commercial and family cases, mainly within the Greek and European legal environment.

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I.- INTRODUCTION

Throughout the social and political history of human kind we find differences that distinguish among people and classify them in categories. Except for the natural characteristics acquired by birth, such as handicapped or mentally defective persons, most differences are constructions of the human mind based on characteristics such as clan, ethnicity, nation, race, social class, religious sect etc¹. These differences have their roots in all modern societies and primarily take the form of three types of inequity: power, wealth and knowledge, distinguishing individuals in the ones who own the desired resources and the ones who do not, categorizing them in strong and weak individuals or social groups accordingly. Throughout social and political struggles people have always fought not only for the acquisition of fundamental rights but also for enjoying equality among them and before law, and furthermore for enjoying fair and just allocation of goods and services. Justice has been established as the primary institution for regulating conflict of power in private individual interrelations, as well as in administrative relations, i.e. between people and a state. It has the authority to reverse power imbalance and adjust different interests and needs.

To accomplish equality, a state provides every citizen, irrespectively of his gender, age, social status, economic capacity or religious believes, with the right to seek recourse to justice and assert the satisfaction of his/her interests. In practice, this possibility is granted through binding laws, principles and ethical standards imposing a firm legal framework, the implementation of which helps judges impose the equal exercise of civil or other rights of both disputants, acknowledge the rights of the weak, and respectively restrain the chaotic results of the “rule of the strong”. Law primarily aims at redressing power imbalance among citizens which dictates and results in the prevalence of one’s status, will or needs upon others. It derives from the very core instincts of every living creature on earth, whether in human, animal or natural environment, and exists in all levels of coexistence. It emerges in all kinds of individual interrelations in everyday life of a contemporary state, no matter how civilized and profoundly organized a country might be.

¹ Dugan A. Marie, “Power Inequities”, Beyond Intractability, Conflict Information Consortium, University of Colorado 2003-2012, p. 3

II.- EQUALITY BEFORE LAW

A state's fundamental individual and social rights are established in its Constitution² and international Treaties³ it has signed or acceded to, which outline the basic norms of a state's structure and public policy and at the same time reflect the historical background and national mentality. In a democratic state, the separation of powers between the legislative order, the executive order and justice, aims at founding transparent procedures for the implementation of laws and the enforcement of the decisions of a governmental majority, in order to secure free enactment of civil rights, freedom of expression and equality among citizens on solid grounds. States regulate their functioning by establishing and implementing laws. Law has two basic and intimately connected tasks: to solve conflicts and to foster conformity to legal rules⁴. On these grounds we wonder: Is there real equality among citizens before law? What are the mechanisms a state uses to guarantee it?

III.- JUSTICE

Expecting a citizen to assume responsibility for acting in a morally appropriate and even-handed way is at least frivolous and visionary. Justice is the state's normative tool which operates through laws and principles of the Procedural Codes, and provides prescriptive assertions of the principle of equality, in order to guarantee the exercise of fundamental rights for all its citizens. The existence of natural, social and economic power inequities between people demands the state's drastic intervention to restrain, if not eliminate, the phenomenon of inequality and provide its citizens with the possibility of peaceful coexistence, personal and transactional relations, prosperity and growth. Equal treatment by law and equality before law are the preconditions for inducing the improvement of a citizen's life and give him the possibility to invent creative options to profit in individual and social level.

² Greek Constitution 1975/1986/2001/2008 Articles: 1 (Equality before law), 8 (Right to natural judge), 20 (Right to legal protection) etc.

³ For example: Charter of Fundamental Rights of the European Union (2010/C 83/02) Articles: 1 (Human Dignity), 2 (Right to life), 6 (Right to liberty and security) etc.; European Convention on Human Rights and Fundamental Freedoms, as amended by Protocols No 11&14, Articles: 2 (Right to life), 6 (Right to a fair trial) etc.

⁴ Vilhelm Aubert, "Courts and Conflict Resolution", The Journal of Conflict Resolution, Vol. 11, No 1, Law and Conflict Resolution (Mar., 1967), p. 1

Inequality of power often exists among conflicting parties. In this regard, the prevalence of the “rule of the strong” is deemed to be officially unacceptable for a well governed state and legally inadmissible for justice.

IV.- PROCEDURAL PRINCIPLES

General principles as a source of law govern both Procedural Codes and substantive law to eliminate physical, social and economic inequities, and attempt to at least provide a “technical” equality among disputants. Party self-determination, equality of rights and obligations as well as the right to a fair hearing, the publicity of the sessions, the obligation of the litigants to participate in litigation in good faith and honesty, are some of the basic principles, acknowledged universally, that govern the procedure of the adversary system and underlie in detail the norms for disputing parties’ access to courts⁵.

Equality as a constitutional right is also served by the ideal of being tried before a legally appointed court of law, consisted by professional experts, trained to guarantee equal treatment and procedural fairness of all the parties involved in a dispute, understand the core issues of a case and conduct thorough investigations of the material facts to estimate the liability of the defendant. This is an indefeasible right for every class of people no matter whether they are privileged or not. No one can be deprived of this right, nor can a judge decline his office. It is the right of access to the “natural judge”⁶, i.e. the natural person who is nominated as a judge or a court of law which has jurisdiction to rule a case. A judges’ duty is to resolve the disputes that one of the litigants brings before him asking for a final decision on the case, namely the enforcement of the judicial decree against the defendant. Impartiality, objectivity and neutrality, as well as judge’s knowledge and legal expertise are the basic reasons why parties usually waive their capacity of attempting to reach a resolution by themselves and entrust an unknown third party to intervene in the conflict.

A judge exerts his power by interpreting and implementing the law within the limits that general principles of law, Procedural Rules, substantive law and case-law indicate. He renders his principled and reasoned decision based on legal norms. Although a dispute resolved finally is presumed to be fair and equitable for both parties,

⁵ According to the Greek Code of Civil Procedure, these principles can be found accordingly in Articles 106, 110, 113 and 116.

⁶ See supra note 5, Article 109

infringements of substantive or procedural rights provide the unsatisfied party with the legal ground to review the decision before a higher court. Additionally, violation of the standard of fairness, or unequal participation in the trial both in jurisdictions of common and continental law, provides a legal basis for bringing the case before the highest court of a country.

Despite the objectives of Procedural Principles, equality of arms and equality before law are often violated in practice because of excessive use of available legal delays and remedies for the challenge of the enforceability of a court decision, made, in most cases, by malevolent debtors who do not want to abide by the award, but would rather spend money on long-lasting litigation to avoid the satisfaction of the winning party. Therefore equality of parties before law is often overturned on legal grounds by the same Procedural Rules that are established to guarantee it, as the winner of litigation remains unsatisfied for a very long time after the trial. Thus, the strong or weak position of the parties may, in practice, be changed depending on the circumstances of a particular case.

V.- ARBITRATION

By virtue of law the formal process of conventional adjudication can be replaced by arbitration, if the parties agree, in writing, to submit a future dispute of private nature in arbitration which derives from an already existing transactional relation between them. On the grounds of the arbitration agreement they may choose the mutually acceptable procedure to appoint the arbitral tribunal, the definition of a certain time limit for the initiation of the process, the applicable substantive law, the language in which the arbitration will be conducted, the seat of arbitration etc. Here the parties are practically withdrawing voluntarily from their legal right of access to the “natural” judge, to choose, by subjective criteria, and on the basis of his/their expertise in the subject matter of the case, the individual(s) who will constitute the arbitral tribunal. The constitutionality of this institution lies on the parties’ free and un-coerced decision to submit their dispute to arbitration⁷. To serve justice the arbitrator(s) must be neutral and impartial, and shall adjudicate the case within the limits of certain principles and procedural norms to guarantee for the parties a fair hearing, a highly structured process,

⁷ Καϊσης Γ. Αθανάσιος, «Ακύρωση διαιτητικών αποφάσεων», εκδόσεις Σάκκουλα 1989, β’ έκδοση, σ. 32

and finally, render a substantially just and equitable award. The arbitral tribunal emanates its power on the arbitration agreement.

Arbitration is based on equality of parties⁸ which is a public policy principle, from the application of which parties cannot abstain⁹. It means that none of them retains special rights or is relieved from being liable for complying with a procedural obligation. Another important aspect of this principle is the value of equality for a fair hearing¹⁰, which means that each disputant retains the right to participate in all the discussions of the case, of being heard, submitting and supporting his allegations, as well as counter-arguing, orally or in written, his opponent's claims. Any infringement of this principle renders the arbitral award voidable¹¹. An already appointed¹² arbitral tribunal practically implements this value and satisfies fairness, when it summons timely both parties to submit, within a specific time limit¹³, their allegations and supportive documents and gives them time to be informed and counter argue the opponent's allegations and means of proof. Arbitrator(s) should not use as basis of their reasoning of the award prior personal knowledge of the case, otherwise they violate the principle of a fair trial by depriving the other party of his right to appraise and eventually counter-argue evidence. Last but not least, hiring a legal expert to assist the tribunal with the legal issues of the dispute, due to lack of legal knowledge, does not infringe the aforementioned principles.

Arbitration is based on parties' self-determination who are entitled, by making a new agreement, to decide and formulate the applicable procedure (timetable, sequence, number and place of sessions, preliminary awards, disclosure of evidence, etc.)¹⁴, unless they confide this task to the tribunal¹⁵. In every case the tribunal has to apply the fundamental principles of equality as mentioned above¹⁶.

⁸ See supra note 5, Article 886;

Greek Law on International Commercial Arbitration 2735/1999, Article 18 (ΦΕΚ Α 167/1999)

⁹ Κουσούλης Ν. Στέλιος Διαιτησία-Ερμηνεία κατ'άρθρο», εκδόσεις Σάκκουλα, 2004, σελίς 78

¹⁰ See supra note 5, Article 886&2

¹¹ See supra note 5, Article 897 section 5;

Κεραμεύς/Κονδύλης/Νίκας «Ερμηνεία ΚΠολΔ» εκδόσεις Σάκκουλα 2000, τόμος ΙΙ, σ. 1686, σχόλιο 22

¹² Καΐσης Γ. Αθανάσιος, Απαλαγάκη Χαρ. «Ο 5^{ος} Λόγος Ακύρωσης της Διαιτητικής Απόφασης (άρθρο 897 αρ. 5 ΚΠολΔ)», σελίς 5

¹³ See supra note 12, p. 6-7

¹⁴ See supra note 5, Article 886&1;

See supra note 7, p. 34

Φουστούκος Αγγελος «Η Διαιτητική Διαδικασία», Δ 1980, 222, 225-226

¹⁵ Multiple First Instance Court of Athens 8257/82, ΕλλΔ 24 (1983), 550

¹⁶ See supra note 12, p. 4

Furthermore arbitration is a primarily confidential process mainly due to its legal ground which is the agreement of the parties¹⁷. It is conducted between the signatories of the arbitration agreement or their authorized representatives. However confidentiality is practically violated, when one of the parties challenges the enforcement or the recognition of the arbitral award before civil courts where sessions are public¹⁸.

The choice of the parties to submit their dispute to arbitration reflects their belief in the legal and substantive basis of their arguments and proves their economic capacity to undertake the high costs of the process. Except for their competence to express freely their opinions and wishes, it also proves their sufficient capacity to negotiate effectively, to regulate for instance procedural matters. Primarily it indicates their will to comply voluntarily with the arbitral award, which is rendered final, if they decide to waive from the right to challenge it. Although these findings demonstrate that power imbalance issues do not normally emerge in arbitration, this may not be the case at the time the dispute arises, when things may have changed for one of the disputants due to financial, social, political or other external reasons, that have impacted on his economic capacity or on his efficiency to produce the goods or provide the services agreed.

Despite the firm structure of the arbitration process, its main disadvantage, in relation to litigation before courts, is the reduced guarantees of judicial impartiality and neutrality¹⁹.

VI.- MEDIATION

Mediation is another alternative dispute resolution method to adjudication. It is a structured process by which, in its basic facilitative type²⁰, an impartial third party, the mediator, administers a dispute and facilitates its resolution by helping disputants reach a mutually acceptable agreement. It has proved to be a successful process for resolving mostly civil, family and commercial disputes, and it has gained the prestige of being a considerate substitute for court decisions. Contrary to adjudication, it offers a quick, less costly and effective settlement of cases, to which parties often voluntarily comply with,

¹⁷ See supra note 9, σελίς 77

¹⁸ See supra note 7, σελίς 32

¹⁹ See supra note 7, σελίς 40

²⁰ Large-Moran Pamela, "Ethical Standards for Mediators: The Utility of Professional Codes of Conduct", Conflict Resolution Services (CRS) Atlantic, p. 4-5;
Αμανατίδης Ηλίας, «Η διαδικασία της διαμεσολάβησης», Νομικό Περιοδικό «Ενώπιον», τεύχος 52, Ιούλιος – Αύγουστος 2009, σελίδες 12-13

the enforceability of the resolution, and the possibility of improving opposing parties' relationship that would normally be destroyed after a lengthy trial. This advantage is particularly important in family cases, where matters of child custody, parenting time, alimony, etc. are involved.

The outmost goal of the process is to defend the civil rights of the parties and provide a fair and just outcome, namely to confer justice. To achieve this goal mediation is regulated under the auspices of a nation's wider legal framework, namely Constitutional Rules, European secondary legislation²¹ and Civil Procedural Principles, which are usually implicitly or explicitly incorporated into national mediation law and Code of Conduct²² to serve as a guide for the handling of mediation on equal grounds for both parties. More specifically the values of mediation, the process itself, the role of the mediator, the available remedies and the submission to and/or the mediation agreement signed by the parties, play important role in serving fairness.

Mediation process retains its own autonomy towards litigation and arbitration. It includes a specific structure of stages (preparation, opening, exploration, negotiation and conclusion) that are carefully constructed to guide parties smoothly from one stage to another, whereas practitioners of mediation suggest that bypassing a stage rushing to the end is not recommended, as it can jeopardize the whole procedure. Due to its informality the disputants have the opportunity to tailor it, in collaboration with the mediator, according to the needs of their case. No Procedural Rules of evidence apply. The main part of mediation is usually conducted in the exploration and negotiation stage, where the mediator meets privately with each party (private sessions) and encourages them to actively participate in resolving the case, trying to focus on the core issues of the dispute and explore possible solutions. At the last stage, if parties find an arrangement, they draft an agreement that is signed by them, their legal counsels and the mediator.

²¹ European Directive 2008/52 of the European Parliament and Council on certain aspects of mediation in civil and commercial disputes

²² European Code of Conduct, Articles: 2.2 (impartiality), 3.1 (procedure), 3.2 (fairness of the process); American Bar Association. American Arbitration Association, Association for Conflict Resolution "Model Standards of Conduct for Mediators", Standard I (self-determination), Standard II (impartiality), Standard VI (quality of the process)

VII.- APPLICATION OF THE ADVERSARIAL SYSTEM'S PROCEDURAL PRINCIPLES IN MEDIATION

Mediation is based on the principle of parties' self-determination, i.e. in their voluntary participation to the process, their non-coerced decision making pursuant to which each party actively participates in mediation and makes free and informed choices as to process and outcome²³. In its most extreme application, self-determination provide parties with the right to withdraw from the process, if during mediation they feel they cannot trust the process or the mediator, or if they believe it cannot serve their needs.

In the adversary system, once a lawsuit is filed before a court, the defendant is literally "dragged to it". If he does not participate in trial, his default produces procedural and substantial consequences that often end up in his losing the case. Self-determination applies to the scope of subject matter that can be introduced into trial. Parties abide by certain procedural rules and have little implication in the process. They have to comply with the court order.

Contrary to publicity of the sessions in litigation, confidentiality is another core principle of mediation that governs the communication of either party with the mediator in private sessions, as well as all information obtained by the mediator, unless otherwise agreed by the parties or required by applicable law²⁴. A mediator cannot be summoned as a witness to testify before a court about exchanged proposals for settlement or confidential issues he learnt during mediation, if the unsatisfied party later initiates litigation for the subject matter of the case²⁵. Confidentiality is one of the main reasons why parties usually choose mediation to resolve their dispute, especially when they are involved in cases with sensitive issues (business secrets, family divorce) which they prefer to keep for themselves.

Neutrality and impartiality of the third person in mediation means that the mediator does not judge the liability of the parties for the damage caused, does not express his opinion about the exchanged proposals at the negotiation stage, does not play the role of a counsel, nor does he recommend or render a decision. His main task is

²³ See supra note 22 p. 12, "Model Standards of Conduct for Mediators" ABA.AAA.ACR, Standard I; Greek Mediation Law 3898/2010 Article 4 section b (ΦΕΚ Α211/2010);

See supra note 21 p. 12, Article 3 section a

²⁴ See supra note 22 p. 12, "Model Standards of Conduct for Mediators" ABA.AAA.ACR, Standard V

²⁵ Harvard Law Review, "Protecting Confidentiality in Mediation", Vol. 98, No. 2 (1984), p. 454

See supra note 22 p. 12, Article 7;

See supra note 23, Greek Mediation Law, Article 10 & 2

to assist the communication of the parties and to enable them reach a viable solution. In litigation, as we have already mentioned, the role of the judge is completely different.

Finally, the non-binding character of the process means that the proposals exchanged by the parties during the course of the negotiation stage do not bind them until a final settlement is written and signed.

VIII.- APPLICATION OF ARBITRATION'S PRINCIPLES IN MEDIATION

Being an ADR method to litigation, mediation performs within the normative boundaries of arbitration, although with some fundamental differences.

Confidentiality applies both in arbitration and mediation with the difference that in the latter it binds all participants to maintain this obligation before, during and after mediation. Only the fact that a settlement has been achieved or not, can be testified by the mediator before a court of law, whereas arbitral awards usually become public as confidentiality applies strictly on the explicit agreement of the parties. However according to recent US case-law²⁶, issues of mediator's obligation to abide by this principle have been adjusted to the specific nature of a case (for instance labour cases) and to the social impact a settlement produces for public interest, in order to serve justice beyond the closed boundaries of a mediated case.

The mediation process is informal. Parties do not need to choose a law to conduct it. Normally, national mediation law outlines only the basic procedural framework which shall be administered by a mediator with or without a legal background, being a judge, a lawyer, a civil engineer, a psychologist etc. Legal issues normally concern mediation to the degree that they provide a clear picture of the risk assessment, namely of the chances of winning or losing in court, if a resolution is not found. Moreover, a mediated settlement may contain terms and conditions that bind the participants to satisfy the needs and interests of third persons who do not engage in the process, whereas in arbitration the signatories of the arbitration agreement are the only ones who participate in the process and who are bound by the arbitral award.

Finally, in mediation the parties do not literally submit and support their arguments but only state their positions and express their will of what would be an

²⁶ Gibson Kevin, "Confidentiality in Mediation: A Moral Reassessment", Journal of Dispute Resolution, Issue 1, Vol. 1992, No. 1, p. 35-39 (Cases: Tomlinson of High Point, Inc; NLRB v. Joseph Macaluso, Inc; Bottarro v. Hatton Associates; Adler v. Adams; Simrin v. Simrin)

acceptable outcome for them. This positional-based negotiation will eventually be transformed into an interest-based discussion for what they truly need. In arbitration the disputants practically litigate their case based on specific substantial and legal rights that the law provides.

Impartiality and neutrality regard the process as well as the outcome in both procedures with the distinction that an arbitrator renders a binding award, whereas a mediator has no such obligation, unless asked by the parties to disclose his opinion.

Despite the aforementioned differences, both procedures recognize that parties should be provided with equal opportunities to exercise their legal rights and duties, and the right of being heard.

VIII.- ETHICAL DILEMMAS

Mediation has a specific procedural structure consisting of its own values, the different stages of process, the mediator's role and Codes of Conduct, which provide a general guidance to ethical challenges and the mediation agreement, whereby parties state the rules that will govern a particular process. The substance of the case is a different issue. It concerns the core of the conflict, the discussions in the exploration and negotiation stage and the outcome of mediation that may be either a settlement or a failure²⁷. However, as mediation goes on, the distinction of process and content within stages proves rather difficult, as content usually shapes procedure depending on the needs that arise from the interaction between the parties or from their communication with the mediator. From the beginning until the end of mediation, the mediator is obliged to practically "judge" the power (im)balance, the progress or an apparent deadlock, the free will or the coercion dynamics that emerge between the participants, and decide if and how he has to continue the process, intervene, try to persuade the strong party into changing his/her position or acknowledging his/her unethical behaviour, insist on the strong party's compliance with the agreements made before the initiation of mediation or suggest an option that seems more equitable to him.

Answering these estimations is usually urgent as they concern practical issues which will shape the continuance of the process or cause a negative reaction, even the withdrawal of a participant. At these crucial moments, unfortunately, there is no guidance for a mediator to seek recourse to, as most Codes of Conduct often provide

²⁷ Coyle Michael, "Defending the Weak and Fighting Unfairness: Can Mediators Respond to the Challenge?", *Osgoode Hall Law Journal*, Vol. 36, No. 4, (1998), p. 636-637

general principles about his role and do not suggest solutions on specific ethical dilemmas. Despite the fact that there is no safe distinction between the process and the content of dialogue²⁸, Principles of Codes of Conduct govern process, ignoring that discourse is the substance of every mediation stage and that the outcome of the decisions will formulate the terms and conditions of the final settlement. This is the reason why it has been argued that *everything*²⁹ the mediator says or every proposal he makes, may have impact on the settlement, whereas questions regarding practical issues, such as his suggestion for a break of sessions, in order to give parties time to think of an option for the continuance of negotiation, could not possibly affect settlement.

Moreover we should distinguish between the wide range of intervention choices a mediator makes, in relation to those that an adjudicator or an arbitrator makes in the safe framework of legal rules, which specifically limit his options and lead him towards a more or less predictable award. The mediator does not know whether his choices will ensure a successful process, neither what the result of the mediation might be. Although his judgements may resemble the ones made by an attorney, in the course of rebutting the proposals of his opponent in the negotiation stage, the latter also happens within the boundaries of substantive law and legal remedies available. An attorney similarly faces the prospect of success or failure of his decisions in the predictable legal environment³⁰.

And this is the point where the first question arises. Does the procedural structure of mediation serve fairness? In other words, is it capable of guaranteeing a just outcome? If law provides that specific cases shall be submitted mandatorily to mediation before going to litigation, how is the weak party affected? In cases of power imbalance, what are the choices of the mediator? Does he have the authority to intervene and to what degree, in order to regulate a situation, when one of the parties is trying to monopolize the process, for example by a long lasting introductory monologue? Will the mediator's intervention be interpreted as partiality? Can he insist on a withdrawal of a proposal, when the strong party reveals that (s)he has deceived his/her opponent by providing lacking information about the material facts of the dispute? What are his choices, when one party is intimidating or threatening the other with physical abuse or economic disaster? What is the definition of an illegal activity?

²⁸ MacFarlane Julie, "Mediating Ethically: The Limits of Codes of Conduct and the Potential of a Reflective Practice Model", Osgoode Hall Law Journal, Vol. 40, No. 1 (2002), p. 60

²⁹ See supra note 28, p. 58

³⁰ See supra note 28, p. 59

Is there a difference between an illegal behaviour and “furthering” an illegal activity itself³¹? What is the impact of the mediator’s personality, ethical values and self-respect? What does the cultural background of the participants dictate about their expectations of a neutral and impartial mediator? To what degree are the norms decided by the parties in the mediation agreement binding, when one of them is attempting to violate them, thinking that confidentiality binds the mediator from communicating the violation to the other party? Are there specific skills that a mediator should have depending on the nature of the case?

The aforementioned questions are some examples of ethical dilemmas that may emerge in mediation. The lack of a formal structure of the process in relation to the inability of the mediator to intervene strongly during the course of mediation or to impose a fair solution, are extra challenges, which generate even more doubt as to what can an individual expect and how safe he might feel by engaging in the process. The issue becomes more critical, when somebody considers the proposed advantages of mediation for a mutually acceptable solution that will serve both parties’ interests and needs. In other words, we have to appraise what are the express or implied promises made to the disputants by the mediator about his role and the successful dynamic of the process.

Prior to deciding to mediate their case, disputants usually attempt to reach a negotiated settlement through their representatives or lawyers who may have used various tactics to secure a position for attack or defense. Depending on the type of the negotiator (analytical, creative, diplomatic etc.) these tactics may include dishonest tricks or actions³² (such as delays for a senior approval, bullying, escalation of claims, misleading data, etc.) and more importantly lies. In confirmation of this practice, the principle that often prevails in negotiation, dictates that in order to achieve a negotiated agreement or to maximize one’s profit, parties are “entitled or permitted to lie”³³. Despite the fact that such beliefs in real practice have already proven to be ineffective because of failing to provide an acceptable outcome for the disputants, they cannot be accepted in mediation under any circumstances. The use of good will or bad faith rules reflects what parties consider as permissible or even ethical tactic in negotiation, and

³¹ See supra note 28, p. 81

³² Papakonstantinou Demosthenes, “Negotiations – Part II” Nomiki Bibliothiki Seminars, March 19-20, 2010

³³ Wetlaufer B. Gerald, “The Ethics of Lying in Negotiations”, 75, Iowa Law Review, 1219, (1990) p. 1245

what they will probably do or expect their representatives to do in mediation³⁴ to counter-argue or nullify the opponent's claims. Nevertheless, there is one ground rule which suggests that neither party will be willing or expected to disclose its reservation point, i.e. the minimum amount he is prepared to accept by the other side to settle the case, to the mediator, let alone to its opponent, as this fact itself would render him helpless and absolutely deprive him from his negotiating power.

The mediation agreement usually contains the parties' expectations regarding the role of the mediator, the issues to be discussed, and reflect the factual, legal and social background of the dispute³⁵. It is at the preparation stage where the experienced mediator will foresee and draw questions regarding disclosure of evidence, defining acceptable negotiation behaviour and the mediator's remedies in case one party violates the set rules and raises issues of unfairness. The parties should specifically agree that they will negotiate *diligently and in good faith*³⁶, conferring upon the mediator the authority to use the remedies they have consented upon and waiving their right to withdraw from the process due to "mediator's partiality". The rule regarding the reservation point should also be included along with the statement that, if the mediator finds out that an intentionally misleading, false or inaccurate information is being used by one of the participants in order to deceive the opponent, the parties agree that he is entitled to gradually respond by the following remedies: he will attempt to persuade the party to alter its statement or proposal; he will remind the party of the type of negotiation he agreed to before the initiation of the process; he will reveal the deceptive information and this action will not be deemed as partial or breaking the rule of confidentiality; he will terminate mediation and/or report to the negotiator's superiors (who are represented in mediation by the particular negotiator) about his non compliance with the agreed rules and the failure of the process out of his own liability.

The mediator should "educate"³⁷ parties about the nature of the process they are engaging in, by explaining that mediation goes beyond the narrow boundaries of a competitive or an adversarial process and the logic of win-lose solutions. This is the reason why not acting in good faith is not compatible with mediation values. A mediation agreement drafted by the disputants' express consent which contains specific

³⁴ See supra note 33, p. 1246-1248

³⁵ See supra note 27, p. 651

³⁶ See supra note 27, p. 663

³⁷ Maise Michelle "Neutrality" Beyond Intractability, The Conflict Information Consortium, University of Colorado 2003-2012, p. 6

norms for the conduct of the process and the mediator remedies, will give them the possibility to think of the variety of controversial issues they had not realized up to now, and probably decrease the chances of mischievous behaviour.

IX.- CODES OF CONDUCT

Codes of Conduct prescribe the model standards that provide the fundamental ethical guidelines for mediators³⁸ to assist them with the complex issues that may arise in mediation. First of all, Codes of Conduct add credibility and promote people's confidence in mediation process by providing a specific framework for mediators' actions. Their purpose is to balance the disadvantage of informality which may cause distrust regarding procedural fairness against a potential exploitation by the party who owes higher status, greater financial resources and expertise³⁹. Second, they define the guidelines that help mediators address deceptive and unfair negotiation. Third, they enhance public recognition of mediation as a distinct profession from that of an individual counsel, attorney, therapist or negotiator.

Codes of Conduct focus on the principles that govern the role of mediators, such as self-determination, impartiality, conflicts of interest, competence and confidentiality and generally regard that a potential violation of their provisions is deemed to be an ethical dilemma to which mediators should react timely and sufficiently in order to comply with the rules. However they do not answer what a mediator should do to secure substantial fairness.

Very often a mediator has to value conflicting interests and eliminate any traces of parties' distrust regarding his commitment to be neutral and impartial. A value-based decision can be extremely difficult to make because of the significance a value may represent for each party. Individual opinions and beliefs about values tend to be quite stable and non-negotiable⁴⁰, whereas conflict is at most times conceived as a threat to somebody's needs, interests or concerns⁴¹. An individual, who participates in mediation believing that the mediator will guarantee his right to a fair hearing and meet challenging behaviour of the other participant, might perceive a mediator's

³⁸ See supra note 22, both European Code of Conduct for Mediators and "Model Standards of Conduct for Mediators

³⁹ See supra note 28, p. 50

⁴⁰ Maiese Michelle, "Interests, Positions, Needs and Values, The Beyond Intractability Project, The Conflict Information Consortium, University of Colorado, 2003-2012, p. 2

⁴¹ Webne-Behrman Harry, "Creating Effective Systems for Managing Conflict", Leadership and Management Development Conference, October 21, 2009, p. 3

phenomenally controversial choice as partial. At this point we have to remember that parties are in conflict, and attempt to resolve their dispute outside the formal adversary system which supplies them with specific procedural rules that secure their rights and serve values beyond doubt. In most disputes⁴² parties have already asked the assistance of their attorneys to examine the material facts and legal issues of the case, and are already aware of their chances to win or lose in courts. The information they have obtained about the legal aspects of the dispute has provided them with a “filter”⁴³, which produces a specific perception of the legal acceptability of their position. If they have prepared to litigate the case, this perception has upgraded into a firm conviction for the validity of the lawsuit and the chances of winning in litigation. Therefore the fact that the parties voluntarily choose to submit their dispute to mediation cannot be appraised as an equal withdrawal of their rights, nor has their adversarial perspective transformed into a “pure cooperative” approach. This is the reason why parties often tend to respond to the “perceived” threats rather than to an “objective” reality⁴⁴. This position-based logical and psychological framework outlines the significance that a mediator’s value-based decision can have for the parties, who need to feel his commitment to the principles of mediation as they were promised to.

Moreover, in case the participants were forced to engage in mediation by law or court decision, a mediator’s choice between two or more conflicting activities emerging from different principles renders a value-based decision even more important for a smooth conduct of the mediation process. A characteristic example of ethical dilemma, which shows the insufficiency of Codes of Conduct to respond, is when the mediator faces the challenge of deciding between a collision of competing principles, for instance confidentiality and impartiality. In this case, Codes of Conduct do not provide the mediator with a safe guidance, for instance a priority perspective to help him choose among the two principles, but on the contrary they ask for the application of both, which in practice is confusing and merely impossible⁴⁵.

A value-based decision is according to the mediator’s beliefs, the best action based on a superior, among two or more, values that answers efficiently the particular

⁴² (exception should be accepted for family cases with a violent history where the spouse-victim seeks recourse to divorce mediation usually out of the sensitive personal issues that (s)he prefers to keep confidential and because (s)he cannot afford the expenses of litigation)

⁴³ Bucklow Amanda and Middleton-Smith Charles, “Foundation Mediation Skills Training Programme” facilitat8, p. 38, Mediation Training of the Chartered Institute of Arbitrators

⁴⁴ See supra note 41, p. 3

⁴⁵ See supra note 28, p. 67-68

challenge⁴⁶. For instance the issue of whether the mediator should intervene or not by asking a question or making a suggestion, or decide to refrain from any response and let tensions defuse by themselves and the process continue, is a choice that once made, produces results and generates other decisions regarding the degree of intervention. For example, does the mediator have to separate parties and continue with private sessions? What should he do, if he understands at the negotiation stage that one party has not realized the consequences of his commitment, in case he accepts by final settlement the proposal made by the other party? By all means not all choices are ethical, as questions may arise regarding practical issues, such as, whether mediation will be scheduled at day time or in the evening⁴⁷. This mediator's decision could be deemed to be partial, if it practically rejects one party's preference and complies with the one made by the opponent. Finally, a characteristic example of how delicate balance can be in mediation, is the significance of the shape of the meeting table, which should convey a sense of fair balance for both disputants!

Codes of Conduct seem to provide mediators with "right" or "wrong" answers as if they can predict good or bad human behaviour and reaction during an ongoing communication. They ignore the dynamics that develop through the parties' discourse and mediator's interaction with them, namely through management of human relationships⁴⁸, the types of which are countless and definitely not predictable. They more importantly seem to forget that each mediator has distinct character and personal style, and his own standards and preferences do reflect the techniques he applies and his (re)action to a challenge by virtue of his own judgement. In reality, only expertise and accumulated practical experience of the mediator can assist him to cope with difficult situations, as a specific mediation is different from any other he has conducted before. No matter how well he has been prepared, or despite parties' understandings contained in the mediation agreement, complex issues may arise before, during and after mediation⁴⁹ jeopardizing the success of the process. Another crucial point is the fact that ethical dilemmas in mediation usually arise during the course of conflict, where tensions are high and the sense of equilibrium is fragile. At these moments the response depends

⁴⁶ See supra note 28, p. 56

⁴⁷ See supra note 28, p. 57

⁴⁸ See supra note 28, p. 62

⁴⁹ (there are cases where the mediator's supervision for the compliance with the terms of the agreement is essential after the successful end of mediation)

on the mediator's discretion. There are no universal rules that dictate a "right" answer or registry of cases he can turn to, to get advice.

Moreover, Codes of Conduct assume that it is the mediator's duty to cope with complicated ethical dilemmas. They intend to assist him by providing a specific normative structure for a diversity of ethical dilemmas. The matter becomes more challenging, when one considers that the professional background of mediators may vary from lawyers and judges to non-lawyers, whereas Codes of Conduct are usually directed to lawyers – mediators⁵⁰ (!) In this regard, the question that arises is where do the non-lawyers mediators are supposed to look at, to get guidance for ethical dilemmas they may face during the course of mediation, when they have no professional Rules of Conduct to help them? An important research conducted by Robert A. Baruch Bush⁵¹ in practicing mediators, categorized ethical dilemmas into 5 types, as follows: keeping within the limits of competency, preserving impartiality, maintaining confidentiality, ensuring informed consent and preserving self-determination, to conclude, among others, that practicing mediators are very much concerned about conducting mediation according to its rules and values, understand deeply the wide range of ethical dilemmas they may face, and are willing to resolve them appropriately and efficiently⁵². This need for effectiveness and sufficiency is reflected in practice by the general requisition of Codes of Conduct, that mediators should be competent and knowledgeable in the process of mediation and regularly update their knowledge and skills by taking training courses or attending educational programmes⁵³.

Finally, according to Standard VI paragraph 9 of the Model Standards of Conduct for Mediators of ABA *"if mediation is being used to further criminal conduct, a mediator should take appropriate steps including, if necessary, postponing, withdrawing from or terminating the process"*. By analogy, the European Code of Conduct for Mediators in Article 3.2 states that *"the mediator if appropriate shall inform the parties, and may terminate the mediation, if: a settlement is being reached that for the mediator appears ... illegal, having regard to the circumstances of the case and the competence of the mediator for making such an assessment ..."* These

⁵⁰ Large-Moran Pamela, "Ethical Standards for Mediators: The Utility of Professional Codes of Conduct", Conflict Resolution Services (CRS) Atlantic, p. 5

⁵¹ See supra note 27, p. 638 where the research of R. A. B. Busch is mentioned and analyzed

⁵² See supra note 50, p. 8

⁵³ European Code of Conduct for Mediators, Article 1.1;
"Model Standards of Conduct for Mediators" ABA.AAA.ACR - Standard IV"

provisions bring up a very important issue that may arise during the course of mediation. They both refer to an act of penal nature, a criminal conduct or an illegal settlement, and although a reference to a criminal conduct seems easy to the unsuspicious reader, it proves to be quite problematic, when we want to distinguish it from an illegal behaviour or from “furthering” an illegal activity itself⁵⁴. In general terms one can argue that an illegal activity that has already taken place between the parties and is disclosed to the mediator during mediation, should not trouble him, if it is not the subject of the present dispute. Moreover, an illegal activity should be distinguished from a criminal conduct of a hideous nature rejected by the legal system and the public opinion. For instance, the infringement of the secrecy of letters that has violated the business secrets of one disputant’s firm is an illegal act and it does raise questions of unfair competition. However, it cannot be regarded as criminal conduct and cannot end up in obliging the mediator take one of the aforementioned remedies. On the contrary, a criminal conduct or an illegal settlement that regards causing physical harm to one of the participants in mediation or against third parties or risking other people’s lives not involved in the process, are examples of criminal conduct. The Greek Mediation Law (N. 3898/2010, Article 10 paragraph 2) which regulates confidentiality in relation to obligations and rights of the parties (mediator, legal representatives, parties) in mediation, provides that none of them shall be examined as a witness nor is he obliged to bring proof or elements related to the mediation that has already taken place, *“unless such an obligation is imposed by rules of public order to secure primarily the protection of minors or to avoid the danger of risking the physical integrity or the mental health of a person”*. In the latter case the specificity of law omits the ethical dilemma of what the appropriate reaction of the mediator should be, by imposing on him the duty to report to the official authorities (police department, Public Prosecutor) about the information he has been aware of, categorizing confidentiality as an obligation of secondary importance. However neither of the aforementioned provisions states what the implications will be for the mediator, who does not comply with the responsibility of reporting the criminal activity. Does he run the risk of being accused as an accomplice of the parties?

Finally, a mediator has an additional challenge to face. He has to be competent to withdraw his personal opinion and ethical values from the outcome he detects the

⁵⁴ See supra note 28, p. 81

parties are going to settle for. He has to find a balance between his own ethical standards, the parties' expectations and ethical values, and the goals and principles of mediation.

X.- THE ROLE OF THE MEDIATOR

The role of the mediator itself is the key element which distinguishes this particular method from the rest ADR methods. His presence adds value to the process by the application of his skills and techniques. In most cases his goal is to resolve conflict. To achieve this, he listens actively by showing empathy⁵⁵ for the participants' feelings and experience, shows understanding, enhances communication, promotes collaborative negotiation by moving from positional to interest based negotiation and avoids or resolves deadlocks. Moreover, mediation requires an atmosphere free of restraint and intimidation to be effective and successful. A mediator is responsible for creating a safe environment, where both parties feel they can express their concerns freely. The goal is to inspire parties trust in him as competent to administer the process and handle the opponent, as well as the emerging issues. Trust discerns him from being merely another counsel of one of the parties. Once gained, mediation can successfully proceed. To gain parties' trust the mediator has to be firm with the process and values of mediation, in addition with the agreed rules contained in the submission and/or the mediation agreement. Another crucial challenge for him is to build rapport⁵⁶ with the parties by giving them, among a variety of different ways of conduct, a sense that he understands their positions and wills. At this point a distinction between the two notions is necessary: Gaining trust does not mean building rapport. This is usually the relation of a judge with the disputants that bring their case to trial, whereby the latter respect and believe in the judge's skills and knowledge and anticipate a fair decision. On the contrary, having rapport but no trust between two individuals could mean having a friendly, intimate relation without aiming at the resolution of the problem. However, a mediator needs to have accomplished successfully both tasks to be able to work with the parties on their conflict and conduct mediation.

By virtue of law he administers the process by drafting the submission or mediation agreement, establishing agendas and ground rules to promote and facilitate communication between the parties, choosing the party who will speak, determining the

⁵⁵ See supra note 43, p.67

⁵⁶ See supra note 43, p. 24-32

appropriate duration for each disputant's introductory speech, deciding who he will first have a private session with or whether the level of progress made during private sessions enables him to rejoin parties in a common session to discuss openly the remaining issues, allowing the participation of third persons (special scientists, experts), making reality checking, revealing underlying issues (if allowed to or obligated by law), terminating prematurely the mediation if he believes there is a danger for the safety of third people not involved in the process, postponing the discussion for another day and supervising the drafting of the settlement.

The mediator should be a skilled negotiator. The knowledge of principles and functions of negotiation enables him to acknowledge tactics and maneuvers parties and their representatives use during mediation to convince or mislead the opponent. Moreover the mediator should be aware of the underlying psychological mechanisms⁵⁷ of the parties at the initiation of the process, who usually tend to combine the notion of fairness with positions or proposals that benefit themselves, being unwilling to admit that this stance will ruin every possibility of negotiating and finally result in a deadlock. It is also important to have in mind that the parties usually focus on the opponents' actions and interpret them as evil and aggressive bargaining, whereas at the same time they believe that their own positions should be understood as reflecting the best intentions and good will! This is an impasse the mediator is aware of and it is also the first challenge he will have to overcome to build the ground for an effective communication. To facilitate his understanding of the case the disputants should inform him of their prior attempts to negotiate the case before ending up in mediation, and of the degree of acceptance or failure of these attempts. This knowledge will enhance the mediator's power and flexibility arising from parties' choices or preferences, and help him find the best possible options in the exploration and negotiation stage for the resolution of the dispute.

XI.- THE VALUES OF MEDIATION

Apart from the aforementioned general duties, the values of mediation i.e. self-determination, neutrality, impartiality, confidentiality and the non-binding character of the process, dictate the mediator's performance and stance and serve him as guiding

⁵⁷ Babcock Linda and Loewenstein George, "Explaining Bargaining Impasse: The Role of Self-Serving Biases", *The Journal of Economic Perspectives*, Vol. 11, No 1 (Winter, 1997), p. 2

lines to address ethical dilemmas, despite the doubts they raise for their sufficiency and effectiveness.

A) SELF-DETERMINATION

Self-determination is a principle that runs through the whole mediation and regards the ability of making free and informed choices, starting from the mediator selection and ending up with the drafting of the terms of a settlement or with one or both parties' withdrawal from the process⁵⁸, if they feel it does not meet their expectations or they cannot trust the procedure or the mediator. This latter possibility is based on the disputants' voluntary participation in mediation, in its most extreme sense. Principle of self-determination is violated when law or a court order obliges parties to submit their dispute to mediation before initiating litigation.

Self-determination is a core value of mediation and at the same time the most risky disadvantage for a free will arrangement and the satisfaction of the interests and needs of both parties, due to the lack of formal procedure and the inability of mediator to impose a fair settlement. No one can ever predict whether mediation will be conducted in a mutually collaborative spirit, as sometimes power imbalance is not evident from the start, but when revealed, the mediator has to intervene to help the weak argue for his/her interests. Self-determination is based on the free, active and equal engagement of the disputants in the process, which in case it does not exist, there will be no ground for a fair and equitable outcome, and the mediator is obliged to terminate the procedure.

B) NEUTRALITY

One of the key virtues of a mediator is his neutrality which enhances his authority before the eyes of the conflicting parties who want to be treated equally and need to trust the third party in conducting the process. However, this notion in practice can be defined in various ways depending on the way each individual interprets neutrality, the cultural background he comes from, and the mediation mentality that formulated the mediator's style. Before the initiation of the process, a mediator rarely explains the parties what they should expect from him as neutral and that is why misunderstandings usually occur regarding his role. The issue becomes more complex

⁵⁸ See supra note 22, "Model Standards of Conduct for Mediators" ABA.AAA.ACR - Standard I

when the “triad” of individuals, mediator and parties⁵⁹, involved in the resolution of the dispute, comes from different countries where distinct ethics apply. For example, a British mediator is normally expected firmly not to take sides during the process, not to intervene with the substance of the dispute, and finally does not aim at a settlement but rather works to secure procedural fairness. On the exact opposite side a Latin-American mediator can be an insider-partial, namely someone who may be aligned with one of the parties, but this stance is not deemed to be an impediment on behalf of the parties for the continuance of mediation, who still respect him and trust him as being fair⁶⁰. These two characteristic examples produce immense impact to participants who may be nationals of different countries between them as well with the mediator. That is why the choice of the mediator is significant for the successful conduct of the process, and his style may be significant for the impact of power imbalance issues on the value system of each party.

A definition of being neutral is having no conflicting relationship with either of the parties, namely not being involved in the subject matter of the dispute, or not maintaining any kind of relationship with either of the parties⁶¹. Additionally, the mediator is required to conduct a “reasonable inquiry”⁶² to find out whether an issue of partiality might arise. In case of existing proof or even suspicion of conflict, he shall disclose it to the parties who are free to decide to proceed or not with mediation.

A more extreme explanation of neutrality dictates that the mediator is indifferent in parties’ welfare. It is unlikely, however, whether once this stance is disclosed to the participants, the latter will be willing to engage in the process with the particular mediator, as their inner necessity is to co-operate with someone who really wants to resolve their dispute and release them from trouble.

Nevertheless, maintaining a neutral stance can prove to be rather challenging in cases of power imbalance, where the strong party gains control leaving the opponent silent and helpless, or when the weak party cannot communicate clearly his/her side of the truth. The ethical dilemma which arises for the mediator is, if he can intervene to restore the strong party’s commitment to the initial agreements made regarding the acceptable type of negotiation the participants agreed to use, or whether he should

⁵⁹ See supra note 27, p. 640

⁶⁰ See supra note 37, p. 4

⁶¹ See supra note 22, “Model Standards of Conduct for Mediators” ABA.AAA.ACR - Standard III

⁶² See supra note 22, Standard III & B

regard the principle of confidentiality as prevailing and “conceal” the apparent unfairness. Another matter that should be taken into consideration is that the mediator has practically no means to investigate the substance and truthfulness of evidence that is being produced, nor can he oblige parties to bring him proof, i.e. the necessary documents⁶³, which verify the honesty of their allegations.

C) IMPARTIALITY

The notion of impartiality seems to be similar or slightly confusing, in relation to neutrality; nevertheless it has a distinct meaning which produces its own dynamic for the process and the mediator’s role. It refers to the even-handedness of the mediator and more particularly to the objectivity and fairness he has to show to both parties during the course of mediation. Being objective simply means focusing on facts and not being influenced by personal feelings or opinions about what the best solution for the particular dispute should be. This stance enhances the mediator’s credibility and attributed power among the “triad” of participants in mediation, facilitating in the end the performance of his duties and the acceptance and respect of the parties. According to Standard II of the Model Standards of Conduct for Mediators of ABA “*impartiality means freedom from favoritism, bias or prejudice*” which obliges the mediator “*to decline a mediation if he cannot conduct it in an impartial manner*”. The further analysis provided regarding this Standard explains in detail the explicit actions, opinions or beliefs a mediator should refrain from, and additionally takes into account the cultural factor of the parties that he should respect in order to conduct mediation successfully. This possibility verifies the rule that the informality of the process provides the parties involved with the opportunity to tailor it according to their needs.

Pursuant to Article 2.2 of the European Code of Conduct for Mediators, “*the mediator shall at all times act, and endeavour to be seen to act, with impartiality towards the parties and be committed to serve all parties equally with respect to the process of mediation*”.

Although these provisions impose specific duties on a mediator, there may be cases where serving impartiality practically means taking measures, i.e. in simple terms, intervening in the process to redress power imbalance, whereas at the same time this stance contradicts the mediator’s neutrality duty. What will the mediator choose?

⁶³ Field Rachael , “Neutrality and Power: Myths and Reality”, ADR Bulletin Vol.3, No 1, May/June 2000, p. 4

According to most Codes of Conducts, as we have already mentioned, he has to comply with both principles. However, in reality, mediators cannot be completely even-handed and keep equal distance from the parties, because this would mean supporting the powerful one against the weak⁶⁴. From all the above, and as we shall see later examining cases of family abuse, we conclude that the mediator has the potential to decide to intervene on behalf of the weak party who is in a critical situation of being exploited or deceived, and overlook the prescribed duties of neutrality and impartiality⁶⁵, the application of which may, in a certain situation, result in a grossly unjust outcome that a court decision would never permit.

D) CONFIDENTIALITY

The principle of confidentiality primarily seems to reflect a strict rule upon both the participants and the mediator. It has two aspects: it concerns private information gathered through the process of mediation and parties' trust for the mediator and the process⁶⁶. However, a question arises concerning whether preserving this privilege of mediation, is necessary for the performance of the process itself by the mediator⁶⁷. Practice has shown that the degree of absolutism⁶⁸ or relativism this principle applies, depends on the subject matter of the dispute and the implications a settlement might have for third persons who do not engage in mediation. For instance, the issues that may arise from a family case vary significantly from the ones of a labour case, where the intimacy of communications could probably harm other employees who will remain unaware of the scope of the negotiation boundaries of their employer, as well as of the outcome of the previously settled case, and will be obliged to go through the same process mediating their disputes from scratch. Confidentiality can also be contrary to public interest, where cases involve wide groups of people or social organizations who are not represented as legal persons in a specific mediation.

The mediator's experience can help him foresee possible challenges regarding the firmness of applying confidentiality. Exceptions established by law, such as child

⁶⁴ Field Rachael, "Rethinking Mediation Ethics: A Contextual Method to Support Party Self-Determination", This paper is drawn from a forthcoming book chapter – "Exploring Contextual Ethics in Mediation", p. 3

⁶⁵ See supra note 63, p. 3

⁶⁶ Burnley Richard and Lascelles Greg, "Mediator Confidentiality – Conduct and Communications", Trainees, ADR Section, SJ Berwin, p. 27

⁶⁷ See supra note 26, p. 33

⁶⁸ See supra note 26, p. 28

abuse or imminent harm to others, should be extended by analogy to abuse of elderly or mentally defective people who have been incapable of defending themselves or unwilling of reporting the incident to the police because of intimidation or threat⁶⁹. However, violent incidents should be specifically included in the mediation agreement as exceptions of confidentiality, because there may be no legal requirement imposing a duty of disclosure to a mediator. In any event, illegal acts not included in the mediation agreement should be judged on a basis of appropriateness and proportionality, namely the mediator should evaluate the harm already done with the benefit that could arise for both parties from a possible settlement⁷⁰. Preserving confidentiality should enhance the chances of reaching a solution without undermining one party's rights, or should increase the possibility of improving the relationship of the participants. These estimations have to be made on a wider distinction between morality and law⁷¹. Thus, there are examples of a perfectly legal act being immoral, for instance racism may be legal according to the laws of a state but it is absolutely immoral. Abuse or murder are both immoral and illegal, whereas "white" lies or broken promises may not be illegal, although they are immoral.

The significance of confidentiality as a general rule should be estimated within a wider framework of mediator abilities, parties' expectations, securing the procedural fairness of mediation and promoting a cooperative spirit of communication. The limits however, between confidentiality and impartiality are fragile, as, if a mediator is required to disclose a secret before a court, this testimony would probably be interpreted as breaking impartiality in favour of one of the parties. A more liberal aspect of the theme would argue that testifying before a court only about the facts and the outcome of mediation without expressing his own beliefs and biases should not be regarded as violation of impartiality on behalf of the mediator.

E) THE NON BINDING CHARACTER

It regards the exchange of proposals during the negotiation stage. Parties are not bound by them, until they write and sign an agreement containing the final terms which resolve their dispute.

⁶⁹ See supra note 12 at p. 7

⁷⁰ See supra note 26, p. 34 : Wigmore Test: sets 4 criteria in order to regard confidentiality as protected public right, in relation to the maintenance of presidential secrecy; it was applied by President Nixon in the Watergate Affair

⁷¹ See supra note 26, p. 8

XII.- POWER

Power has its own sources, principles and functions by its own logic. In general terms it can be defined as the ability to prevail upon others and “get what one wants”⁷², or “the ability to influence the behaviour of someone else to get the desired outcome”⁷³. It can also be understood as “control of or access to emotional, economic and physical resources desired by the other person”⁷⁴.

An individual’s power may derive from a combination of factors according to the nature of the case. In a family case, involving domestic abuse or not, power may derive from one’s system of belief, personality, self-esteem, gender, selfishness, force, income, knowledge, status, age and education⁷⁵. In a commercial dispute, power may come from equilibrium of: profit (tangible or intangible, direct or indirect etc.), reward and punishment, knowledge and information, competition, investment (in time, money or effort) etc.⁷⁶.

In mediation the basic sources of power spring from financial capacity, knowledge and expertise. Practicing mediators often face cases where power imbalance is evident from the preparation stage, or disclosed to them by the spouse-victim in cases of family abuse. In other situations, power imbalance is revealed during mediation, when it is maliciously used by the strong party who wants to impose his/her own solution according to his/her own terms. A mediator should be sensitive to issues of imbalance, and although any intervention by his side is practically an active involvement with all the known biased implications, he has the responsibility to maintain a quality process and guarantee the equal exercise of the parties’ rights.

The mediator is the most powerful party of the triad: He administers the whole process and controls parties’ contact; he knows how to identify equilibrium between the clients and interpret the meaning of body language, i.e. physical stance, verbal communication, tone of voice and non verbal elements⁷⁷.

⁷² Parenti M.J., “Power and Powerless”, New York: St. Martin’s Press, 1978, p. 4

⁷³ See supra note 32

⁷⁴ Neumann Diane, “How Mediation Can Effectively Address the Male-Female Power Imbalance in Divorce”, *Mediation Quarterly*, Volume 9, Number 3, Spring 1992, reference to John Haynes 1988, p. 278

⁷⁵ Ver Steech Nancy, “Yes, No, and Maybe: Informed Decision Making about Divorce Mediation in the Presence of Domestic Violence”, *William & Mary Journal of Women and the Law*, 2002-2003, p. 183

⁷⁶ See supra note 32, “The Sources of Power”

⁷⁷ Papakonstantinou Demosthenes, “Mastering Negotiations – Part III – Body Language”, *Nomiki Bibliothiki*

The existence of power does not necessarily prescribe its use or misuse, which depends on the specific parties' choices in a negotiation. Besides, a party who has the potential to influence the outcome to get what (s)he wants, may choose for personal, family or business reasons, not to take advantage of the situation and negotiate in good faith indeed. Moreover, power has its own features, the analysis of which can prove to be enlightening for the way it functions.

Primarily, it is very rare that one side retains absolute power over the other.⁷⁸ Each party has a degree of power to express his will, feelings and opinions. However, unless someone is aware of his/her power, (s)he is not able to exercise it. In case the mediator realizes that (s)he cannot help a party enhance his/her communication and participation in the process, he may propose a counsel's or an expert's assistance.

Moreover there is no presumption, such as the gender of the actors, which attributes in advance power to males as a class. A particular man can be powerless before a particular woman, that's why power depends on the situations and varies in degree, which can change according to the circumstances and the different roles of each actor. For example, a man does not retain the same degree of power as husband, father, employee or member of a sports club⁷⁹. Power is relative, as no one owns it continuously, i.e. a financially strong party may prove to be vulnerable under specific circumstances⁸⁰.

It is limited, i.e. a buyer does not always have the potential to influence the seller and get what he wants⁸¹, and it exists only within the limits that it is acknowledged and granted by one's opponent.

It depends on the transactional or other type of situations that may change and overturn the present imbalance. For instance, in a divorce case the spouse who initiates the procedure seems to retain more power regardless of his or her gender in relation to the other spouse who is being abandoned⁸² and the fact that the latter may have been the "strong" spouse until asked for a divorce.

⁷⁸ See supra note 32

⁷⁹ See supra note 74, p. 3

⁸⁰ See supra note 27, p. 649

⁸¹ See supra note 32, "The Principles of Power"

⁸² See supra note 74, p. 8

Finally, power may also be real or illusive, which means that it does not guarantee success to the individual, even if it derives from blackmail or rational argumentation⁸³.

A) VARIOUS TYPES OF POWER IMBALANCE IN MEDIATION

Power imbalance in mediation has been observed in the following circumstances:

1) In various forms of deceit or intimidation, such as distorting, misinterpreting or misrepresenting important elements of the case, not revealing the real amount one party can pay for the indemnification of his opponent, using misleading time margins (unreasonable delays, postponements, deadlines), monopolizing the discussion, namely precluding the other party from expressing his opinions or defending his interests, adopting a rigid/non-negotiable position, raising voice, using anger, irony⁸⁴, personal attacks against the opponent to exercise psychological pressure in order to intimidate him/her, trying to make him/her do or accept anything out of guilt or pride etc.

2) A party in mediation can become “technically” weak by engaging in the process without been prepared, namely when it has not analyzed thoroughly the material facts and the legal arguments of the case, and therefore cannot bargain successfully, neither safely predict the outcome of a possible litigation. This technical weakness may be also produced by the filing of an inadmissible lawsuit which will definitely be dismissed by the court. Additionally, a long delay of the claimant to initiate litigation may have already formed the situation and the facts of life for both parties in such a way, that a change is probably impossible to the detriment of the claimant. Moreover the lack of knowledge about negotiation tactics, the lack of Best Alternative to a Negotiated Agreement (BATNA), the inability of expressing one’s needs and wants, deprives him/her from exercising his/her rights on equal terms.

3) A party is also “deemed weak” when it needs to settle the case immediately due to urgent economic necessity, being willing to accept a less favourable agreement in relation to a court decision, which would indemnify him/her with better terms for the loss (s)he has suffered. In this case, the wealthy opponent will try to take advantage of the situation by using all handful negotiation tactics of delay, lack of authorization to

⁸³ See supra note 32

⁸⁴ See supra note 75, p. 199

decide for the agreement, denial to decide for trivial issues⁸⁵ etc. to coerce the poor party settle the case with the less profit possible.

4) When one party cannot afford to finance litigation (lawyer's expenses, discovery process) if mediation fails, and is forced to agree with a proposal that does not satisfy his/her interests⁸⁶.

5) When a party does not seem to understand the implications of accepting an arrangement in case (s)he complies with the terms of the settlement, but refuses to take expert advice due to lack of economic resources⁸⁷.

B) THE ISSUE OF FAMILY ABUSE

In family cases, power imbalance is usually evidenced with the form of unequal allocation of goods and economic power (the husband has a job and gains more money than his wife, so he can afford to go on living alone, owns the family house etc.), knowledge of negotiation skills, willingness to exercise power and decrease the necessary financial means for the rest of the family (wife and children) to live separately. All these means, practically, are negotiating advantages in the detriment of the female spouse.

However, the psychological, social and economic models that in previous decades used to complicate a divorce procedure for the female spouse seem to have lost their significance in modern societies. Wives are no longer expected to live "at the shadow" of their ex-husband, being dependent on his financial support, and living in social isolation (as examples for avoidance). In most cases they are financially independent contributing to the expenses of family life, have knowledge of bargaining and are capable of responding efficiently to defend themselves against attempts of control. In contemporary societies, they are acknowledged as being "*potential equals*"⁸⁸. Nowadays divorce is deemed to create economic, emotional and personal difficulties that affect both spouses, especially when they have (common) children. It involves a transitional period, where instability prevails for a long time until they are ready to redefine their roles in society as individuals and go on with their lives again.

⁸⁵ See supra note 66, p. 3

⁸⁶ Fiss M. Owen, "Against Settlement", 93 The Yale Law Journal 1073, volume 93, number 6, May 1984, p. 1076

⁸⁷ See supra note 28, p. 73-79.

⁸⁸ See supra note 74, p. 4

A specific category of family cases are the ones of domestic abuse. Domestic abuse can be a pattern of physical, emotional or sexual abuse exercised by the batterer upon his victim⁸⁹. It may include unkind comments that insult or ridicule the victim, actions of anger, irony and threat of revenge that intimidate the victim into physical, emotional, financial or sexual submission, silence, self-pity, lack of self-respect, depression, deprivation of spousal and parental rights, as well as social isolation. It also involves exercise of physical violation such as pushing, slapping, choking, punching, use of weapons and rape⁹⁰ that may escalate into homicide. Violence is usually followed by promises of repentance and change that the batterer gives the victim, when the latter expresses the will to leave the relationship and abandon the batterer in the event this behaviour is repeated. Unfortunately it all lasts for a little while, until the abuser finds a new opportunity to blame the victim and resort to his usual habits again. In most cases family children are also included in the circle of violence, as usually in the perverse mind of the batterer everyone gives him motives to get angry once more.

This relational background of a divorcing couple has provoked a lot of scepticism, whether mediation can respond to a power imbalance of this kind on equal terms, safeguard the weak party's rights, and end up in a settlement containing mutually acceptable terms that will enable the surviving-spouse go on with his/her life and deter the batterer from intimidating the victim or abusing it. The male spouse is usually stronger for the same typical reason that apply in family non-violent disputes with the difference, that in the majority of family abuse, the male party seems to end up in a more favourable position in relation to the one he was before.

To face these kind of cases, the mediator has to be a professional divorce mediator with specific training on divorce cases and abuse issues, and he should additionally have long experience to know how to handle the participants, understand the underlying issues that maybe neither of them is willing to admit, be able to discern the signs of intimidation happening during mediation and estimate the degree of its impact to the victim, foresee the implications that a temporary decision might have upon the life of the victim and the children, take precautionary measures to verify the safety of the surviving-spouse as well as him/herself during mediation. In case the

⁸⁹ Long Martin, "Stopping Domestic Violence – How a Community Can Prevent Spousal Abuse", University College Dublin, Degree Master of Arts (Mediation and Conflict Resolution), August 2006, p. 11 and 19

⁹⁰ See supra note 75, p. 152

couple has children, the abuse victim should be provided with sufficient information regarding custody awards given to batterers, or awarded by virtue of the “best interests” standard, or if a joint custody is possible. An arrangement should include specific rules and duties imposed to each parent regarding child custody, communication and alimony, in order to avoid possible fighting and exercise of abuse in the future.⁹¹

Practice has shown that not all cases of domestic violence are the same and this is the reason why not all of these cases can be resolved by mediation. Luckily or not this is a decision that a mediator shall take at the preparation stage with or without the assistance of the parties’ counselors. It is a case by case choice and depends on the severity of the abuse, the length of time abuse has taken place, the possibility to control the abuser behaviour during mediation by ordinary procedural mediation tools (e.g. separate sessions) and verbal techniques (reframing), and conduct a quality process within the limits of dignity and respect. Mediation is impossible to conduct, and if started it should be terminated immediately, unless the abuser admits responsibility for exercising violence upon his spouse, not carries a weapon, does not drink or uses drugs during mediation, abuses or attempting to abuse by verbal or physical violence the spouse-victim or the mediator⁹², so as to coerce them to abide by his own terms. This behaviour is the external result of very well founded beliefs of his personality that reflect his own value system towards human kind and needs, and it is unlikely to change by submitting the divorce case to a mediator. However, the victim’s will to mediate is the primary condition that must be taken into account. Additionally, its capacity to participate actively in mediation must be assessed on an individual level. It varies depending on her personality; degree of acceptance of the fact that she has so many times been deprived of her rights as woman, mother, spouse; severity of abuse; fear for retaliation which usually escalates by the time of divorce; financial capacity to afford a separate life or litigation in case mediation fails. Research has shown that both men and women may be equally perpetrators and victims of domestic abuse⁹³. However, in most cases victims are female.

To ensure a smooth conduct of the mediation process in family violence, some of the measures a mediator can take are: the establishment of specific rules for conduct in mediation, such as excluding offensive language and actions, interrupting the other

⁹¹ See supra note 75, p. 199

⁹² See supra note 75, p. 195

⁹³ See supra note 89, p. 17

party when he speaks, intimidating or raising voice; ask parties to consent in strictly refraining from any physical contact indoors and outside mediation; encourage legal representation of the parties; hold only separate sessions; allow the presence of a third party (usually a relative or a friend); terminate the process at different times for each participant in order to ensure a safe arrival and/or departure of the victim-spouse⁹⁴. An important tool to discourage such behaviour is the agreement that confidentiality will not cover intimidating actions or abuse that will be immediately reported to the official authorities.

In the majority of family abuse cases, mediation is the only process the victim can afford due to deprivation of financial resources, whether employed or not. Although criminal prosecution in some cases functions as deterrence for the continuation of abuse, strong representation before courts, including restraining measures and court orders, are usually impossible to obtain⁹⁵.

Finally, mediator's ethical dilemmas exist also in family cases of domestic abuse, with the difference that, here his choices can prove to be fatal for the victim of the abuse. The mediator duties with regard to procedural and substantive fairness are exactly the same as in every other mediation; however, the burden of power imbalance is huge. The mediator should know exactly what (s)he is doing. Neutrality regarding the outcome should be distinguished from the safety of the participants and the quality of the procedure⁹⁶.

XIII.- CONCLUSION

The matter of the relation between the weak and the strong party in mediation can take wide dimensions. The burden of confronting power imbalance and guaranteeing fairness for the parties is entrusted to the mediator who seems to be alone in administering their relational conflict. He undoubtedly needs to establish a specific strategy depending on the nature of the dispute and the complexity of the issues to conduct mediation within a framework of equal treatment and mutual respect. Responding to ethical dilemmas practically means managing human relationships. His personal beliefs and ethical standards affect his style and reflect on the techniques he applies in the process; this is a factor he should be consciously aware of, so as to avoid

⁹⁴ See supra note 75, p. 201

⁹⁵ See supra note 75, p. 169

⁹⁶ See supra note 75, p. 188

being driven by it during the evolution of the process. Moreover the role of the attending lawyers⁹⁷ is significant for assisting the mediator and upgrade the level of procedural and substantial fairness.

Although ethical-philosophical thinking could be a source of inspiration for facing ethical dilemmas, it does not seem to be sufficient to cover challenges in practice. Mediation Institutions worldwide⁹⁸ should co-operate to create an electronic data base where practicing mediators, upon their discretion, could record a short summary of material facts and ethical issues they faced, along with the choices they made and how these affected on the parties and the process. Confidentiality should be respected by all means regarding the personal details that could identify the participants.

Despite the difficulty of the mediator's role and the worries about preserving equality guarantees for the parties involved, mediation has flourished and substituted litigation in a wide range of cases. This reality is due to the repeated disappointment of the legal community for the inefficiencies of the adversary system, and the result of its efforts to invent other procedural means to resolve legal problems in private and flexible ways which have proved to be efficient and successful.

⁹⁷ Παντελίδου Π. Βασιλική «Διαμεσολάβηση – Ένας νέος θεσμός και ο ρόλος του Δικηγόρου», εκδόσεις Νομικό περιοδικό Αρμενόπουλος, τεύχος 9, Σεπτέμβριος 2012

⁹⁸ Apart from the problem-solving framework proposed by Michael Coyle, see *supra* note 27, p. 655-657 and the reflective-practitioner model referred in the article of Julie Mac Farlane, see *supra* note 28, p. 71-73

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